United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

74-1235

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P/L

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

ABDON ACEVEDO, et al., :

Appellants, :

-v- : NO. 74-1235

NASSAU COUNTY, et al., :

Appellees. :

- x

PETITION BY APPELLANTS
FOR REHEARING IN BANC

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Preliminary Statement

Plaintiffs-Appellants, low income minority residents of Nassau County in need of decent housing, and two Nassau County civil rights organizations, respectfully petition for rehearing in banc of the decision of July 2, 1974, holding that appellants have failed to state a claim upon which relief can be granted, in challenging Nassau County's determination to reverse long standing plans for low cost family housing to be built at the area known as Mitchel Field.

The decision of this Court conflicts with the established law in this Circuit which holds that where minority citizens challenge on racial grounds actions by public officials which interfere with efforts to secure equal housing opportunities and have made out a prima facie showing of such discrimination, the courts are to review those decisions pursuant to a demanding constitutional standard or test. See e.g. Kennedy Park Homes Ass'n. Inc. v. City of Lackawanna, N.Y. 436 F.2d 108 (2nd Cir. 1970), cert.den., 401 U.S. 1010 (1971). Also, this Court failed to consider critical factual findings by the district court that County appellee's reversal of plans to construct low cost family housing at Mitchel Field was "in large part a result of public opposition" and that it is clear from all the evidence that "community opposition to this form of housing has been racially motivated." 369 F.Supp.1384, at 1389.

Furthermore, this Court's determination to characterize appellants' claim as designed to impose "an affirmative duty to construct housing", rather than what appellants contend is a challenge to a racially discriminatory public determination to reject low income family housing, severely undermines the protections afforded by

the Lackawanna holding and presents a question of exceptional public importance. Finally, the Court's ruling that the appellants lack standing to challenge the actions of the appellee General Services Administration (GSA) to locate a federal office facility at Mitchel Field, notwithstanding the County's reversal on the housing issue, is at variance with established principles of standing and raises issues of extreme public importance warranting the granting of this petition.

Procedural History

The complaint which was filed in the District Court for the Eastern District of New York, alleged that the County's action in reversing the long standing plans for the inclusion of low cost family housing at Mitchel Field was racially discriminatory and had the purpose and effect of depriving appellants of equal protection of the laws and rights secured by the Federal Fair Housing Law, 42 U.S.C. 3601 et seq. With respect to GSA, it was alleged that that agency violated the Executive Order on Site Selection (E.O. 11512) and the affirmative action requirements of the Fair Housing Law.

The district court certified this case as a class action on behalf of "all Black or Spanish speaking persons residing or seeking to reside in said County who are eligible for low income housing as defined in state or federal statutes and regulations." Trial was held before the Hon. Mark A. Costantino, who issued his opinion on January 30, 1974 dismissing the complaint in all respects. An immediate appeal was taken and this Court, on February 26, 1974, (per Kaufman, C.J., Feinberg and Mulligan, J.J.) enjoined the County from undertaking further development of Mitchel Field pending the outcome of the appeal. Following the July 2 decision, that injunction was lifted.

Statement of Facts

Mitchel Field is located in the center of Nassau County and formerly served as a United States Air Force Base. The site was declared surplus property in 1960 and the County purchased the land from the federal government. Although Mitchel Field involved about 1122 acres, this litigation focused on the proposed uses for approximately 630 acres which, for the most part, remain vacant.

Throughout the 1960's efforts were made by county officials to determine the proper uses for Mitchel Field. In 1968 the County Executive, Eugene Nickerson, sought to insulate decisions concerning Mitchel Field from political pressures and, with the formal approval of the County Board of Supervisors and the Town of Hempstead, established a non-partisan independent corporation to plan for and oversee development of the Field. This body was called the Mitchel Field Development Corporation (MFDC). MFDC's mandate was "to recommend a definitive plan for the development of the County-owned lands at Mitchel Field and to assist in its implementation."

After working with professional consultants, the MFDC Board formally adopted a plan for the development of the Field which called for the inclusion of 1700 units of housing in the first phase of development at the Field. That housing was intended to include different income groups in a vertical mix - i.e., low, middle and upper income families would all live in the same apartment buildings. The plan adopted by MFDC projected that of the 576 acres of land to be developed by the Corporation, 250 acres ultimately would be devoted to residential uses. Of the residential uses, a total of at least 1200 apartments would be reserved for low and middle-income residents. MFDC's housing proposals carried forward earlier proposals which had been made by the Nassau-Suffolk Regional Planning Board which, in its Bi-County Master Plan, proposed the

construction of multi-family housing at Mitchel Field.

Following release of its report, MFDC held a series of public hearings to acquaint Nassau residents with its development proposals. These meetings attracted large unruly crowds, comprised almost exclusively of white people. Strong negative and hostile reaction was expressed to the proposal for low cost family housing at Mitchel Field.

Mr. Nickerson did not seek re-election in 1970 and appellee, Ralph G. Caso, was elected that year to the post of County Executive. Previously, as Hempstead Town Supervisor, Caso had supported development of scatter-site, low income family housing and in the mid-1960's had called for multi-family housing at Mitchel Field. Nonetheless, when the question of low cost family housing at Mitchel Field became an election issue, Mr. Caso campaigned against such housing. Upon election, Caso reversed all prior plans for family housing and dissolved MFDC, transferring the corporation's functions to county agencies.

Even after this action, the planner retained by Caso's administration to plan uses for Mitchel Field, in a report submitted in January 1971, strongly urged that housing be built at the Field. Also, in December 1971, Nassau County's own Planning Commission, in the first comprehensive development plan ever prepared for the County, recommended that a substantial amount of multi-family housing be built at Mitchel Field. In its report, the County agency remarked on the strong opposition to housing proposals for the Field, noting that the opposition came mainly from residents of the school districts in which Mitchel Field is located. The report stated these residents feared that low cost housing at the Field would affect "the racial balance of the Uniondale School District."

The current plans for Mitchel Field call for a variety of civic and commercial uses. The so-called Santini property (a 10.5 acre portion of Mitchel Field somewhat detached from the main parcel) has been designated by the County as a site for 250 units of senior citizen housing to be built by the Hempstead Housing Authority. This project, which has the approval of the Town and the Authority, was held up, however, because the Department of Housing and Urban Development (HUD) had refused to fund the project. The regional administrator of HUD testified that HUD refused funding because the Town had persisted in building only senior citizen housing which in Nassau is predominantly white housing, while refusing to build low cost family housing which in the County is primarily black housing. He told the Court that HUD concluded that to fund the proposed senior citizen project at Mitchel Field would constitute a violation of the Fair Housing Law in the absence of a commitment by the Town to build family units outside ghetto areas.

The record below established that black residents of the County have been confined to housing in a few restricted areas which are generally characterized by sub-standard housing. For example, the Bi-County Planning Board has concluded that, "Housing problems for non-whites result from poverty and discrimination; non-whites are significantly more limited in their housing choices than whites. The result is segregation, and it is getting worse."

The district court found that "Unquestionably the decision not to construct housing at Mitchel Field is in large part a result of public opposition. . . . Public housing has also been objected to because of the loss of revenue it causes and the increased burdens it places on the community's resources. By far, however, the most objectionable form of housing has been low income family housing. It is clear

from all the evidence that community opposition to this form of housing has been racially motivated." The district court also found that low income family housing is predominantly black and that proposals for construction of such housing have incurred vehement community opposition -- opposition that has already blocked several such project proposals. Finally, the district court stated that "Future proposals are sure to take into consideration the strong feelings of the residents of Nassau County." 369 F.Supp. at 1389.

The record as to GSA indicates that the government has proceeded with plans to build a new federal facility at Mitchel Field which will house numerous agencies and about 2000 employees. Notwithstanding the explicit requirements of the Fair Housing Law, Executive Order 11512, and the Memorandum of Understanding between HUD and GSA promulgated under the Fair Housing Law and Executive Order, GSA proceded with development of the facility without concern for the availability of low cost housing and the County's reversal of plans for housing at Mitchel Field. Specifically, the evidence shows that GSA, without even assessing housing availability in the County, submitted in January 1973 a planned Prospectus on the project to the Office of Management and Budget. This action, in effect, represented a final approval of the project by GSA. Only after submitting the Prospectus did GSA request that HUD undertake a housing review as required by the Memorandum of Understanding.

REASONS FOR GRANTING THIS PETITION

I.

THE COURT'S RULING REVERSES THE STANDARD THAT HAS BEEN REQUIRED IN THIS CIRCUIT FOR TESTING RACIAL DISCRIMINATION

The Court's July 2 decision is at odds with its major ruling in the Lackawanna case; rehearing in banc is therefore necessary to insure uniformity of decisions in this circuit.

In Lackawanna, efforts to build a low and moderate income housing development in a white section of the city were frustrated by a series of city actions, including denial of permission to tie into the City's sewer system. These actions, as in the instant case, followed aggressive public protest by members of the white community. The Court found evidence of racially discriminatory purpose in the City's behavior, but also held that the City's decisions had an illegal, racially discriminatory effect - minority families were being blocked from access to housing in an integrated community. This Court therefore stated:

> The effect of Lackawanna's action was inescapably adverse to the enjoyment of this right. In such circumstances the City must show a compelling governmental interest in order to overcome a finding of unconstitutionality.
>
> * * *
>
> Even were we to accept the City's allegation that any discrimination here resulted from thoughtlessness rather than a purposeful scheme, the City may not escape responsibility for placing its Black citizens under a severe disadvantage which it cannot justify. 436 F.2d at 114.

In setting forth the elements of what is termed the "mosaic of Lackawanna's discrimination", the Circuit Court focused on "the action of the

Planning and Development Board. . . . in reversing its predecessor" and recommendations put forth by that Board "despite the contrary recommendation of its planning expert." Id. at 113

The Lackawanna holding represented a clear acceptance of the principle that where minority citizens allege that public decisions have a racially disparate or harsh effect, the courts are to apply a strict standard in reviewing those decisions. Among the cases cited by the Court to support application of a compelling governmental interest standard were Shapiro v. Thompson, 394 U.S. 618 (1969) and Norwalk CORE v. Norwalk Redevelopment Agency, 355 F.2d 920 (2nd Cir. 1968).

The Lackawanna-Norwalk CORE principle has been reaffirmed by this Court and adopted by numerous other courts of appeals. See e.g. Otero v. New York City Housing Authority, 484 F.2d 1122, 1133 (2nd Cir. 1973); Chance v. Board of Examiners, 458 F.2d 1167, 1175-1177 (2nd Cir.1972); Park View Heights Corp. v. The City of Black Jack, 467 F.2d 1208 (8th Cir. 1972); United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach, ____ F.2d ____ (5th Cir. 1974); Hawkins v. Town of Shaw, 461 F. 2d 1171 (5th Cir. 1972) (in banc). In Chance for example, the Court stated, "The harsh racial impact, even if unintended, amounts to an invidious de facto classification that cannot be ignored or answered with a shrug." 458 F.2d at 1175.

Appellants respectfully suggest that the ruling in the instant case constitutes a dramatic turnabout from this fundamental equal protection doctrine. In the instant case the Court seeks to distinguish Lackawanna by stating that that ruling (and the other cases cited at Slip Opin., p.4617, footnote 3), dealt with "governmental obstruction of private projects beneficial to minority groups or to integration."

On the other hand, the instant case, according to the Court, deals with an attempt to impose "an affirmative duty to construct housing" on Nassau County, citing Lindsey v. Normet 405 U.S. 56 (1972) for the principle that there is no fundamental right to housing. The Court is wrong in characterizing the instant case as one seeking to establish a right to housing. Appellants' challenge is to the County's commission of racial discrimination in reversing plans for the creation of integrated housing opportunities. Appellants maintain that the County's action was permeated with issues of discrimination having a clear racial effect, as well as an invidious racial purpose. By framing the appellants' claim as seeking a right to housing, the Court necessarily deprives appellants of the protections to which they are entitled in a case involving racial discrimination. Certainly the Lackawanna and Norwalk CORE holdings involve more than issues pertaining to housing. Appellants believe that under those decisions Nassau County's actions were to be viewed under a strict standard of review. Instead the Court adopted the view that the County's determination was not subject to judicial review no matter what racial purpose or effect is involved. The Court erred in viewing the issue as a matter of omission (i.e. no affirmative duty to act), instead of focusing on the County's active role in shaping development at Mitchel Field and reversing a commitment to public housing. Compare Gautreaux v. Chicago Housing Authority, 436 F.2d 306 (7th Cir.1970), cert den. 402 U.S.922 (1971).

This Court should not establish a rule of law based on the strained and unrealistic distinction posited in the Court's July 2 decision. Certainly, one could characterize the relief sought in Lackawanna as attempting to impose an affirmative action on the defendant City to provide sewer service to the proposed project. Or here one could, as appellants suggest, look to the fact that the County has sanctioned construction of housing for whites on the Santini section of Mitchel Field, while scuttling

housing for minority citizens - a clear refusal of a governmental body to grant benefits equally to all. Appellants' claim should not be defeated by the novel legal interpretation of Lackawanna set forth in this Court's July 2 ruling.

II.

THIS COURT IGNORED CRITICAL FINDINGS BY THE DISTRICT COURT THAT TERMINATION OF PLANS FOR HOUSING AT MITCHEL FIELD WAS IN RESPONSE TO COMMUNITY RACIAL PREJUDICE

This Court simply ignored the potent findings by the district court to the effect that the County appellees decided to foreclose housing at Mitchel Field in large part because of public opposition; that the most objectionable form of housing to the residents of Nassau is low-income family housing which is predominantly black, and that it is "clear from all the evidence that community opposition to this form of housing has been racially motivated."

Appellants contend that these findings at the very least constitute a prima facie case of racial discrimination warranting application of a rigid standard of review. The district court applied instead a rational basis test, while this Court in its July 2 ruling excluded altogether judicial review of the County's decision, holding that the appellants failed to state a claim upon which relief can be granted. The end result of this Court's ruling therefore is the immunizing of public decisions which are formulated on and responsive to community racial prejudices as found by the district court.

Again, this position is diametrically opposed to the concern expressed in the Lackawanna decision for the need to strictly scrutinize official decisions which

respond to racially motivated community opposition. Moreover, such a reversal of Lackawanna would place this Circuit in direct conflict with the Tenth Circuit which in Daily v. City of Lawton, 425 F.2d 1037, 1039 (10th Cir.1970), stated:

> The appellants point out that the race issue was not discussed at any of the public meetings and that there was no evidence of racial prejudice on the part of any city official. If proof of a civil right violation depends on an open statement by an official of an intent to discriminate, the Fourteenth Amendment offers little solace to those seeking its protection. In our opinion it is enough for the complaining parties to show that the local officials are effectuating the discriminatory designs of private individuals.

Perhaps this Court's position would be appropriate absent any County action with respect to the issue of housing. Once having determined to build housing for minority citizens, however, the Equal Protection Clause and the civil rights laws clearly foreclose Nassau officials from acting on the basis of racial discrimination.

This matter should be reheard to consider the significance of the district court's findings.

III.

THIS COURT FAILED TO PROPERLY ANALYZE THE FAIR HOUSING LAW AND E.O.11512 TO DETERMINE WHETHER APPELLANTS WERE AGGRIEVED BY GSA'S ACTIONS

The Court, in ruling that plaintiffs lack standing to sue GSA for inadequate enforcement of the Fair Housing Law and Executive Order 11512, failed to adhere to the accepted principle that individuals have the broadest possible standing to challenge federal administrative actions under the Administrative Procedure Act, 5 U.S.C. 702 and under other federal statutes authorizing review of agency action by "aggrieved" parties. This is particularly true in cases where the individuals suing are representative of a large class of individuals and raise questions involving the public interest. In such cases, the Courts have recognized that an attenuated injury suffered in common with many others may still be sufficient to establish standing to sue. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); United States v. SCRAP, _____ U.S. _____, 93 S. Ct. 2405 (1973); Adams v. Richardson, 480 F. 2d 1159 (D.C. Cir. en banc 1973).

This Court fashioned instead a limiting rule that in order to sue to secure compliance with the Fair Housing Law and E.O. 11512, one must be a federal employee whose employment will be immediately affected by the location of the proposed federal facility. This limitation is totally unwarranted. It is clear from the language of the laws in question that they are of much broader import and reach, and designed to deal with more than simply the rights of current government employees.

E.O. 11512 clearly is intended to be a remedial tool for solving housing and social problems generally in an area in which federal facilities are to be located.

The Order states:

> Sec. 2. (a) The Administrator, and the heads of executive agencies, shall be guided by the following policies for the acquisition, assignment, reassignment, and utilization of office buildings and space in the United States:
>
> * * *
>
> (2) Consideration shall be given in the selection of sites for Federal facilities to the need for development and redevelopment of areas and the development of new communities, and the impact a selection will have on improving social and economic conditions in the area. In determining these conditions the Administrator shall consult with and receive advice from the Secretary of Housing and Urban Development, the Secretary of Health, Education and Welfare, the Secretary of Commerce, and others, as appropriate....

See generally, Brookhaven Housing Coalition v. Kunzig, 341 F.Supp. 1026 (E.D. N.Y. 1972), motion to vacate preliminary injunction denied, No. 71-C-1001 (E.D. N.Y. July 20, 1972).

It is equally clear that the Fair Housing Law is to provide a broad remedy for the problem of housing discrimination. The Law states:

> It is the policy of the United States to provide, within Constitutional limitations, for fair housing throughout the United States. (42 U.S.C. §3601).

The wide scope of the Act is underscored by the panoply of discriminatory practices proscribed (see, e.g. 42 U.S.C. 3604), and by the broad administrative and judicial relief available. (42 U.S.C. 3610, 3612).

In the case of private actions, the Act provides for suit by a "person aggrieved" which is specifically defined as "any person who claims to have been injured by a discriminatory housing practice (emphasis added, 42 U.S.C. 3610 a, d) or who believes he will be so injured.

In addition to the sections proscribing certain private forms of discrimination, the Act directs that all federal executive departments and agencies, and specifically the Secretary of HUD, "administer their programs and activities relating to housing and urban development in a manner affirmatively to further the purposes of this title . . ." 42 U.S.C. 3608 (d) and (e) (5). Further, all executive departments and agencies are instructed to cooperate with HUD in affirmatively furthering fair housing. 42 U.S.C. 3608 (d). The Courts have held that administrative actions alleged to be in violation of this "affirmative" obligation are violations of the Act which are judicially reviewable under 42 U.S.C. 3610 and 3612. Shannon v. HUD, 436 F.2d 809 (3rd Cir. 1970), Garrett v. City of Hamtramck, 335 F. Supp. 16 (E.D. Mich. 1971); Brookhaven Housing Coalition v. Kunzig, Supra.; Otero v. New York City Housing Authority, Supra. Appellants maintain that the affirmative action requirement imposed upon GSA a duty to respond to the County's reversal on low cost family housing at Mitchel Field.

The Memorandum of Understanding between HUD and GSA, promulgated to implement the Fair Housing Law and E.O. 11512, also makes clear a purpose beyond concern only for government employees. (See Slip Opin, footnote 6). Also, the courts generally have looked to the strong language of the Fair Housing Law and have concluded that Congress intended to provide for comprehensive enforcement of the Act. Trafficante v. Metropolitan Life Ins. Co. 409 U.S. 205 (1972).

All of this indicates the need for reconsideration of this Court's conclusion that the appellants lacked standing to challenge GSA's actions with respect to Mitchel Field.

Respectfully submitted,

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Dated: July 30, 1974

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 963—September Term, 1973.

(Argued March 15, 1974 Decided July 2, 1974.)

Docket No. 74-1235

ABDON ACEVEDO; LOUIS DE GIACOMO; ADELE GRANT; JUDITH LUSTERMAN AND DON-DAVID LUSTERMAN; ALICE PERLMAN AND JULIUS PERLMAN; BETTY ANN REDFERN; RUBY WILLIAMS; BALDWIN COUNCIL FOR HUMAN RIGHTS; and LONG ISLAND REGION NAACP; on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

NASSAU COUNTY, NEW YORK, its officials, employees and agents; RALPH G. CASO, as County Executive of Nassau County; BOARD OF SUPERVISORS OF NASSAU COUNTY; JOHN W. BURKE, GEORGE B. COSTIGAN, ALFONSE D'AMATO, ANDREW DI PAOLA, FRANCIS T. PURCELL and MICHAEL TULLY, as members of the Board of Supervisors; TOWN OF HEMPSTEAD, NEW YORK, its officials, employees and agents; TOWN BOARD OF THE TOWN OF HEMPSTEAD; JAMES D. BENNETT, ALFONSE D'AMATO, ANTHONY C. IMBARRATO, LEO F. MCGINITY, JOSEPH P. MUSCARELLA, GREGORY P. PETERSON, FRANCIS T. PURCELL and EUGENE WEISBEIN, as members of the Town Board; ENVIRONMENTAL PROTECTION AGENCY; WILLIAM D. RUCKELSHAUS, as Administrator of the Environmental Protection Agency; GENERAL SERVICES ADMINISTRATION; ROD L. KREGER, as Acting Administrator of the General Services Administration;

METROPOLITAN TRANSPORTATION AUTHORITY; and WILLIAM J. RONAN, as Chairman of the Metropolitan Transportation Authority,

Defendants-Appellees.

Before:

HAYS and TIMBERS, *Circuit Judges;*
DAVIS, *Judge.**

Appeal from orders entered in the United States District Court for the Eastern District of New York, Mark A. Costantino, *Judge,* dismissing civil rights action against Nassau County and others and against the United States General Services Administration.

Affirmed.

RICHARD F. BELLMAN and LOIS D. THOMPSON, Suburban Action Institute, Yonkers, New York (J. Christopher Jensen, Suburban Action Institute, Tarrytown, New York, and Leonard S. Clark, Nassau County Legal Services, Hempstead, New York, on the brief), *for Plaintiffs-Appellants.*

CYRIL HYMAN, Assistant United States Attorney (Edward John Boyd V, United States Attorney for the Eastern District of New York, and Raymond J. Dearie, Assistant United States Attorney, on the brief), *for Defendant-Appellee General Services Administration.*

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* Honorable Oscar H. Davis, Associate Judge of the United States Court of Claims, sitting by designation.

JOSEPH JASPAN, County Attorney of Nassau County, *for Defendant-Appellee Nassau County and Its Officials, Employees, and Agents.*

JOHN F. O'SHAUGHNESSY, Town Attorney, Hempstead, New York, on the brief *for Defendants-Appellees Town of Hempstead, Town Board of the Town of Hempstead, and the Officials, Employees, and Agents of the Town of Hempstead.*

HAYS, *Circuit Judge*:

Appellants[1] brought this suit as a class action against appellees Nassau County, the Town of Hempstead, New York, various officers of the county and the town, the General Services Administration, and other governmental officials. The complaint alleged that Nassau County, the Town of Hempstead, and their respective officials violated the rights of appellants and others similarly situated by abandoning plans to include low income family housing on a parcel of land known as Mitchel Field. The complaint further alleged that the General Services Administration and other federal agencies violated federal statutes, regulations, agreements, and executive orders by planning a federal office building for the same site without considering the adequacy of low income housing in the area.

The district court conducted a trial and concluded that abandonment of the housing plan was not illegal because it had neither a discriminatory effect nor a discriminatory motive. It also concluded that GSA had acted in accordance

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1 Appellants are alleged to be members of low income minority groups and two organizations that represent members of low income minority groups.

with law in selecting and planning for the federal building. The court therefore dismissed the complaint.

We affirm on the ground that appellants failed to state a claim on which relief can be granted.

I.

Mitchel Field is a parcel of land in the Town of Hempstead, Nassau County, New York, which formerly served as a United States Air Force base. In 1961 after the Air Force had abandoned its operations there the land was declared surplus to the needs of the federal government.

Nassau County purchased approximately 630 acres of the parcel, free of any deed restrictions. The General Services Administration retained 55 acres for federal use. In 1968 the county and the town agreed to create an independent corporation, the Mitchel Field Development Corporation (MFDC), to formulate plans for the utilization of the county's parcel. After some study the corporation recommended a plan which included 1,700 housing units for low, middle, and upper income families.

After release of the plan MFDC held public hearings on its proposals. The hearings revealed substantial public opposition to the plan, especially to the inclusion of low and middle income housing. To calm fears that such housing would become a tax burden on the town MFDC recommended that housing not be constructed at the site until after the development of commercial enterprises which would produce tax revenues.

In the 1970 campaign for County Executive, appellee Caso, who was a candidate for the office, declared his opposition to any housing on the site. Upon his election he dissolved MFDC and transferred its functions to county agencies.

The county has continued to include a variety of educational, commercial, and recreational facilities in its plans for Mitchel Field. It also planned to include 250 units of senior citizen housing. The execution of these plans has been delayed by the refusal of the Department of Housing and Urban Development to fund the project. The regional administrator of HUD testified that the town had developed or was developing several projects for senior citizen housing but none for low income family housing. He testified further that, since senior citizen housing is occupied predominantly by whites and the low income family housing predominantly by minorities, the agency believed that section 808 of the Civil Rights Act of 1968 authorized it not to fund the project unless the town also provided for low income family housing.

Appellants contend that the decision not to construct low income family housing was due primarily to community opposition and that "community opposition to this form of housing has been racially motivated."

In 1968 Congress approved construction of a Post Office facility at Mitchel Field. Subsequently GSA revised and expanded the proposed facility so that now it is planned that it will contain offices for about twelve agencies employing about 2,000 persons. Because of the changes GSA revised its proposed prospectus and in January 1973 forwarded it for approval to the Office of Management and Budget. In October OMB returned the revised prospectus for further revisions because certain federal agencies had withdrawn from the project. In January 1973 officials from HUD and GSA met to implement the Memorandum of Understanding between the two agencies. It was agreed that GSA would circulate to various federal agencies a questionnaire to determine facts about the racial and economic composition of the employees of the proposed facil-

ity. GSA forwarded the information compiled to HUD. Appellants contend that GSA has not discharged its responsibilities under the Memorandum.

II.

Appellees have no constitutional or statutory duty to provide low income housing. There is no "constitutional guarantee of access to dwellings of a particular quality." *Lindsey* v. *Normet*, 405 U.S. 56, 74 (1972).

Appellants argue, however, that once appellees began to plan low income housing for Mitchel Field they could not, consistent with the Fourteenth Amendment, abandon the plan if to do so would have a disproportionate impact on minority groups, unless appellees could show a "compelling state interest" for the abandonment. This argument fails upon the authority of *Palmer* v. *Thompson*, 403 U.S. 217 (1971). As Justice Black stated, 403 U.S. at 227:

> "Probably few persons, prior to this case, would have imagined that cities could be forced by five lifetime judges to construct or refurbish swimming pools which they choose not to operate for any reason, sound or unsound."

As in *Palmer*, appellees here instituted a plan which, though it might have benefitted minority groups and promoted integration, they were not compelled to undertake in the first place.[2]

All of the cases on which appellants rely involve either the refusal of a governmental body to grant benefits equally

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2 The parties have devoted much attention to the question of whether the plan was only a proposal or a commitment, tentative or final, amorphous or concrete, in its formative stages or quite complete. *Palmer* demonstrates that the parties wasted their time in this controversy. The pools closed in *Palmer* had been built and were in use. Stage of construction played no part in the Court's decision.

to all or the governmental obstruction of private projects beneficial to minority groups or to integration.[3] Here appellants seek not to remove governmental obstacles to proposed housing but rather to impose on appellees an affirmative duty to construct housing. This is clearly not required by any provision of the Constitution.

Appellants claim a denial of equal protection because appellees have continued plans to construct low income housing for senior citizens at Mitchel Field. Appellants contend that housing for senior citizens is occupied predominantly by whites and that the inclusion of this type of housing while excluding low income family housing, which would be occupied predominantly by minority persons, is discriminatory.

Of course, it is true that appellees, having decided to construct low income housing for senior citizens at Mitchel Field, would have to operate that housing in a non-discriminatory fashion. But there is no authority holding that once a city or county initiates low income senior citizen housing the Fourteenth Amendment requires it to build a certain amount of low income family housing, too. In

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3 See, e.g., *United Farmworkers of Florida Housing Project, Inc.* v. *City of Delray Beach*, —— F.2d —— (5th Cir. 1974) (city refused to extend water and sewer service to low income housing project although it had extended service to other developments); *Banks* v. *Perk*, 341 F. Supp. 1175 (N.D. Ohio 1972), modified, 473 F.2d 910 (6th Cir. 1973) (city refused to issue building permit for low income housing project and restricted such projects to segregated neighborhoods); *Crow* v. *Brown*, 332 F. Supp. 382 (N.D. Ga. 1971), aff'd, 457 F.2d 788 (5th Cir. 1972) (per curiam) (county officials refused to issue building permits for low income housing project); *Gautreaux* v. *Chicago Housing Authority*, 435 F.2d 306 (7th Cir. 1970), cert. denied, 402 U.S. 922 (1971) (city effectively restricted low income housing projects to segregated neighborhoods); *Kennedy Park Homes Association* v. *City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970), cert. denied, 401 U.S. 1010 (1971) (city rezoned parcel to prevent construction of low income housing project); *Dailey* v. *City of Lawton*, 425 F.2d 1037 (10th Cir. 1970) (city denied building permit and zoning change to low income housing project).

Jefferson v. *Hackney*, 406 U.S. 535 (1972), the Court upheld a state scheme which gave higher grants to aged, blind, and disabled persons than to recipients under the Aid to Families with Dependent Children program on the ground that the legislature might rationally conclude that the latter could more easily bear the hardships of inadequate income. 406 U.S. at 549. The same rationale justifies the housing scheme here.

In *Jefferson* the Court also analyzed the racial impact of the state scheme. Plaintiffs alleged that the scheme entailed invidious racial discrimination because the category of AFDC recipients, who received 75% of computed need, contained a higher proportion of blacks and Mexican-Americans than the categories of aged and blind and disabled recipients who received 100% and 95% of computed need. The Court held that the different ethnic compositions of the groups did not invalidate the system. 406 U.S. at 548-49.

We cannot conclude that appellees invidiously discriminated by providing low income senior citizen housing at Mitchel Field without also providing low income family housing. "Whether or not one agrees with this [decision], there is nothing in the Constitution that forbids it." 406 U.S. at 549 (footnote omitted).

III.

Appellants also raise a rather vague claim under the Fair Housing Act of 1968, 42 U.S.C. §§ 3601-31 (1970). They do not indicate upon which sections of that act they rely and it is difficult to imagine what sections could support their position.

The Fair Housing Act does not impose any duty upon a governmental body to construct or to "plan for, approve and promote" any housing.

Of course, under section 808(e)(5) of the Fair Housing Act, 42 U.S.C. § 3608(d)(5) (1970), HUD has a duty to

> "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter."

On the authority of the statute HUD might be justified in denying appellees funding for other projects if they refuse to approve low income housing. Indeed, that is precisely what happened here. But HUD's discretionary powers under the Act extend beyond the duties imposed by the Act on local housing plans. HUD's action does not mean that appellees have violated section 804 of the Act.

IV.

Appellants claim that the General Services Administration has violated the Fair Housing Act, Executive Order 11512, its Memorandum of Understanding with the Department of Housing and Urban Development, and its own regulations by failing to insure an adequate supply of low income housing near the federal office building planned for Mitchel Field. The claim fails because none of the pronouncements implies a private right of action and because appellants lack standing.

Under *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970), and *Barlow* v. *Collins*, 397 U.S. 159 (1970), appellants must allege they have suffered an "injury in fact" and that they seek to protect an interest "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Data Processing*, supra; 397 U.S. at 153. Appellants satisfy neither of the requirements.

The order, regulation, and memorandum seek to insure that GSA will consider availability of low and middle income housing for federal employees near federal buildings.[4] Assuming that GSA has violated the three pronouncements, appellants have not shown that they are harmed by the violation or that they would benefit from remedying the violation. None of the appellants is or expects to become an employee at the proposed facility. At the most they can only hope that any steps GSA might take to implement the pronouncements would result in the construction of more low income housing than is required for employees at the building and that some of the appellants or the persons they purport to represent might occupy the additional housing. This possibility is too remote to amount to an injury in fact.

Appellants also fail to satisfy the "zone of interests" facet of the standing test. The purposes of the Executive Order, Memorandum of Understanding, and the GSA regulations with respect to low income housing are to assure

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4 Executive Order 11512, 35 Fed. Reg. 2979 (1970), directs the Administrator of the GSA to perform certain duties, consult and coordinate programs with several other federal agencies, and to be guided by seven policies in the selection of federal building sites. The sixth of these policies is:

> "The availability of adequate low and moderate income housing, adequate access from other areas of the urban center, and adequacy of parking will be considered. . . ."

41 C.F.R. § 101—17.104—1(a) (1973) declares that GSA

> "will consider to the maximum extent possible the availability of low and moderate income housing for employees without discrimination because of race, color, religion, or national origin. . . ."

41 C.F.R. § 101—18.102(d)(6) (1973) essentially restates the language of the above-quoted passage of Executive Order 11512.

The Memorandum of Understanding between HUD and GSA announces that its purpose is "to assure for [GSA] employees the availability of low- and moderate-income housing without discrimination. . . ." 41 C.F.R. § 101—17.4801 (1973).

accommodation of federal employees.[5] As we have noted, none of the appellees is or expects to be an employee at the proposed facility.

The Executive Order and Memorandum of Understanding also seek to insure that the GSA will consider the general socio-economic impact of federal building site locations on the areas in which such facilities will be located.[6] Appellants have not shown that location of the office building at Mitchel Field or any act or omission by GSA regarding that building has injured them. Certainly they have

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5 See text of 41 C.F.R. § 101—17.104—1(a) (1973), supra note 4, and statement of purpose of the Memorandum of Understanding, id. Section 2(a)(6) of the Executive Order does not expressly limit its purpose to housing for federal employees. However, the same sentence indicates that adequacy of parking and of access from other parts of the urban area are to be considered. These two factors clearly show that the entire sentence is designed solely for the benefit of federal employees.

6 Section 1 of Executive Order 11512 provides that the Administrator shall

> "(c) coordinate proposed programs and plans for buildings and space in a manner designed to exert a positive economic and social influence on the development or redevelopment of the areas in which such facilities will be located . . . ."

In section 2(a) one of the policies which the Administrator is ordered to weigh is expressed as follows:

> "(2) Consideration shall be given in the selection of sites for Federal facilities to the need for development and redevelopment of areas and the development of new communities, and the impact a selection will have on improving social and economic conditions in the area. In determining these conditions the Administrator shall consult with and receive advice from the Secretary of Housing and Urban Development, the Secretary of Health, Education, and Welfare, the Secretary of Commerce, and others, as appropriate . . . ."

The Memorandum of Understanding declares that GSA will

> "consider the need for development and redevelopment of areas and the development of new communities and the impact on improving social and economic conditions in the area, whenever Federal Government facilities locate or relocate at new sites, and to use its resources and authority to aid in the achievement of these objectives." 41 C.F.R. § 101—17.4801 at 107 (1973).

not shown, or even alleged, any harm from the building's impact upon "social and economic conditions in the area" which would differentiate them sufficiently from the general public to constitute an "injury in fact."

Even if appellants could pass the constitutional test of standing, they would still have to show that the Executive Order, regulation, or Memorandum of Understanding were intended to create private rights of action. None of them expressly grants such a right. Of course, such rights may be inferred when necessary to effectuate the purposes of a statute or regulation. See *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 431-34 (1964). But where the source of the statute or regulation has been silent, courts do not lightly infer such rights.[7] In this case we see no need to find an implied private right of action that would extend to appellants. The obligations created by the Executive Order, Memorandum of Understanding, and GSA regulations are so broad and vague that inferring a private right of action in them would create a strong possibility of protracted lawsuits brought by persons with little at stake before any federal

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7 The Court of Claims has held in *Chambers* v. *United States*, 451 F.2d 1045 (Ct. Cl. 1971), that Executive Order 11478, which prohibits racial discrimination in federal employment, does confer a private right of action. However, the Eighth Circuit has gone the other way on the same question. *Gnotta* v. *United States*, 415 F.2d 1271 (8th Cir. 1969), cert. denied, 397 U.S. 934 (1970). Moreover, it has been uniformly held by other federal courts that executive orders do not create private rights of action. See, e.g., *Kuhl* v. *Hampton*, 451 F.2d 340 (8th Cir. 1971); *Farkas* v. *Texas Instrument, Inc.*, 375 F.2d 629, 633 (5th Cir.), cert. denied, 389 U.S. 977 (1967); *Manhattan-Bronx Postal Union* v. *Gronouski*, 350 F.2d 451, 457 (D.C. Cir. 1965), cert. denied, 382 U.S. 978 (1966); *Farmer* v. *Philadelphia Electric Co.*, 329 F.2d 3, 9 (3d Cir. 1964). We need not decide whether an executive order can ever be enforced by private suit. We hold that we see neither an intent nor a compelling need to create such a remedy here.

This does not mean that executive orders do not have the force of law. See *Farkas, supra*, 375 F.2d at 632; *Farmer, supra*, 329 F.2d at 7.

facility could be constructed. We decline to authorize such a result.

Finally, it appears that GSA has essentially complied with the Executive Order, Memorandum of Understanding, and with its own regulations. GSA is required only to consult with HUD and to consider the adequacy of low and middle income housing. As noted in the statement of facts, because of changes in the proposed facility GSA has not yet forwarded a new proposed prospectus to the Office of Management and Budget. It has made some studies and has consulted with HUD. What more may be done before the final proposed prospectus is submitted is a matter of pure speculation at this time. We need not determine the precise scope of GSA's duties until a suit has been brought by the proper party at the proper time.

Affirmed.

DAVIS, *Judge*, concurring:

I join in the result and also fully in Parts I, II, and III of the court's opinion, but with an addition and a caveat as to Part II. I agree that, for this case, it makes no difference whether the original Mitchel Field housing plan (which included public low-income housing) was definite or tentative. In either case it had not left the planning level before it was changed to omit the low-income housing feature, and appellants could abandon the plan without violating a constitutional or statutory duty. But if the stage of the planning should make a difference, I would hold that the "plan" on which appellants rely was no more than a series of proposals, suggestions, and recommendations for action by Nassau County and other agencies or groups; no definitive or operative action was taken to adopt those proposals which always remained in the process of being evaluated. In a word, if there was a "plan" it was still inchoate, not definitive.

My caveat relates to a housing project which has left the planning stage and gone into full operation. If an existing public low-income project which had lasted for some time were to be abandoned by its public owner because of proven racial discrimination, *e.g.* because too many of the tenants turned out to be black or Puerto Rican, I am not at all certain that *Palmer* v. *Thompson*, 403 U.S. 217 (1971), would control. That case involved swimming pools, not housing, and at least some of the Justices of the majority seemed to indicate that the proof of discrimination was not overwhelming.

As for Part IV of the court's opinion, I concur in it, too, except insofar as it may tend to suggest that the Executive Order involved here created no private rights of action in anyone, not even federal employees. That question is unnecessary to consider in this case which does not concern present or potential federal workers. Depending on their contents and purpose, certain executive orders can and do create private rights of action vindicable in court. Perhaps the most significant in recent years, at least for federal employees, was § 14 of Executive Order No. 10988, 27 F.R. 551, Jan. 18, 1962, *see* 5 U.S.C. § 7301 (1970), which extended to nonveteran civil service employees the statutory protections given veterans against discharge and other adverse personnel actions. That Executive Order and its successor (Executive Order No. 11491) have been regularly enforced, for over twelve years, by the federal courts in a large number of injunction and declaratory actions and in suits for monetary claims. *Cf.* *Arnett* v. *Kennedy*, U.S. Sup. Ct., No. 72-1118, decided April 16, 1974, slip op., pp. 7-11, esp. p. 7, n.7 (opinion of Mr. Justice Rehnquist), p. 7 (opinion of Mr. Justice Powell), pp. 3-4, esp. p. 4, n.4 (opinion of Mr. Justice White).

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July 30, 1974

Clerk
U.S.Court of Appeals
U.S.Court House
Foley Square
New York, N.Y.

Dear Sir: Re: Abdon Acevedo v. Nassau County

Enclosed for filing are twenty-five (25) copies of Appellants' Petition for Rehearing In Banc.

Sincerely,

RICHARD F. BELLMAN
Counsel for Appellants

RFB:df

Certificate of Service Enclosed

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

ABDON ACEVEDO, et al.,

Appellants,

-against-

NASSAU COUNTY, et al.,

Appellees.

- x

Docket No. 74-1235

CERTIFICATE OF SERVICE

This is to certify that on July 30, 1974, the undersigned served two (2) copies of Petition by Appellants for Rehearing In Banc on each of the following appellees:

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Dated: July 30, 1974

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